DOCUMENT RESUME

ED 309 569 EA 021 202

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TITLE	School Personnel Records: Confidentiality vs. The Public's Right To Know. A Legal Memorandum.
INSTITUTION	National Association of Secondary School Principals, Reston, Va.
PUB DATE	May 89
NOTE	10p.; Revision. First published in: "Education Law Update 1987-88."
AVAILABLE FROM	Publication Sales, National Association of Secondary School Principals, 1904 Association Drive, Reston, VA 22091 ($1.00; quantity discounts).
PUB TYPE	Information Analyses (070) -- Reports - Research/Technical (143)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Confidentiality; *Confidential Records; *Disclosure; Elementary Secondary Education; Employer Employee Relationship; Ethics; Freedom of Information; Personnel Data; Personnel Evaluation; *Personnel Policy; Politics of Education; *Privacy; Public Opinion; *School Personnel

ABSTRACT

In the public school the tension between the public's right to know and the individual's right to privacy is clearly played out in questions surrounding the employee personnel file. The document discusses the relationship between employee and employer as well as between the public and the records. An issue often raised is what may or may not be kept in public employees' personnel files, which leads to the legislation of disclosure laws. A step-by-step analysis that an administrator should use to assess each request for records access is provided. Twenty guidelines are offered to assist in deciding whether requested personnel records information should be retained as confidential or should be disclosed. Courts have reserved the right to make the ultimate decision. (SI)

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ED309569

A Legal Memorandum

MAY 1989 *National Association of Secondary School Principals* ISSN 0192-6152

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A Legal Memorandum

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School Personnel Records: Confidentiality vs. The Public's Right To Know

Freedom of Information (FOI) acts do not confer upon the public an absolute right to all government information. There are instances where superior public interest or private need require confidentiality. In the public school the tension between the public's right to know and the individual's right to privacy is clearly played out in questions surrounding the employee personnel file.

Traditionally treated as a repository of "private" information, the personnel file is viewed with suspicion by the employee, and with possessive control by the employer. On the one hand, the employee wants to know what's in it, and on the other, he or she fears something is there others shouldn't see, or have no right to know. The employer has viewed the personnel file as part of its prerogative to employ, promote, discipline, and discharge its employees.

The public, watchdog of its institutions, increasingly scrutinizes these records. The public's right to know what information is retained by its agencies has been legislated at both federal and state levels in Freedom of Information acts. Yet, access to public records has been limited by recognition of the individual's right to privacy, promulgated in federal and state privacy acts.

It is impossible to legislate sufficient detail for a rule book by which school personnel can administer with impunity. Administrative discretion, always subject to challenge, has been met with particular zeal in issues surrounding information which may or may not be kept in public employees' personnel files.

Since the legislation of public records and privacy acts, certain disclosure questions have been clarified about personal information retained by government. The individual has right of access to his or her own file at specified times and places. The public has a right to lists of names and addresses of public employees, to individual salary information, and to records documenting the final decision or order of an employee's discharge.

Likewise, exceptions have been made limiting the right of access to personal information. Access has been limited or restricted in personnel matters involving medical records, certain inter or intra-agency memoranda, materials deemed predecisional drafts and notes, matters reasonably contemplated to be litigated, and information the disclosure of which would constitute an "invasion of personal privacy."

Yet, rules are easier to state than to interpret. The fact that federal laws and each state's laws on these matters differ complicates matters. Application of these rules in the everyday tumble of a public school often presents sensitive questions demanding immediate response without the luxury of careful legal contemplation or judicial *in camera* inspection.

What constitutes an invasion of personal privacy as it applies to information contained in personnel files is the subject of this *Memorandum*.[1] Consider these two examples of dilemmas that daily confront schools:

1. Stories reach the local newspaper about the investigation of an employee's alleged sexual harassment of students; a reporter demands access to the employee's personnel file. Is the fact of an investigation accessible information, predecisional, or litigation-linked? If the applicable state FOI law does not exempt personnel files, will records release constitute an unwarranted invasion of personal privacy?

2. A reporter requests candidate names for a vacant principalship. The board wants to withhold the names to avoid political divisiveness. Must they be released?

Under such situations, an administrator needs both a

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knowledge of specific statutes that govern his or her school district, and an understanding of the principles undergirding the applicable public records and privacy laws. Then case law on personnel file issues can be applied with more assurance.

The courts more often have determined what is not an invasion of privacy than what is. Yet, judicial reasoning suggests when release of personal information in an employee's personnel file would constitute an invasion of personal privacy.

Unwarranted Invasion of Personal Privacy: An Analysis

Public records are the people's records, and the officials in whose custody they happen to be are merely trustees for the people. This trusteeship concept is the philosophical cornerstone for the federal and various state public records acts. This portion of the *Memorandum* sets out the step-by-step analysis that an administrator should use to assess each request for records access.

Is This a Public Agency?

Public school administrators are agents of a public school district, and so are covered by these statutory laws. Clearly, private institutions are governed by common law rules on privacy matters.

Whether federal or state statutes apply to some organizations closely aligned with public schools may be a closer question. For example, a University of Georgia court held that the report by a contracting visiting committee, which evaluated the mathematical and sciences program, was covered under public record law. In a similar case, the Florida Supreme Court held that papers prepared by a consultant in connection with its confidential search on behalf of a power company were reviewable under the state public records law.

Is the Requested Information a Public Record?

"What is a public record?" is a question of law. Generally, statutes define a public record as "one required by law to be kept," or one "necessary to be kept in the discharge of a duty imposed by law." Some state statutes define the term "public record" very broadly. For example, Ohio legislates that a "public record" means "any record that is kept by any public office. . . ."[2]

However, the mere fact that a writing is in the possession of a public officer or public agency does not make it a public record. It is the nature and purpose of the document, not the place where it is kept, that determines its status.

In the Georgia university case, the visiting committee report evaluating a university mathematics department was found to be a public record. The Florida court in the utility case held that a "public record" is "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." The letters, memoranda, resumes, and travel vouchers made or received by the consultant in this case were public records.[3]

However, the court distinguished other materials. It found that the consultant's handwritten notes made during or shortly after his interviews with job prospects were "preliminary materials intended to aid the consultant when he later formalized the knowledge gained during the interviews." Thus, these records would be exempt.

Is It a Personnel File?

The federal Freedom of Information Act contains nine disclosure exemptions. Section 552(b)(6) [Exemption 6] exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[4] Not all state records statutes are sufficiently parallel to the federal statute to include a personnel file exemption. For those states that do have such an exemption, determination that the information requested is part of a personnel file is the next step in carrying the burden.

The term "personnel file" is not defined in the federal act. Nor is the term found in Black's legal dictionary, or any legal encyclopedia source. One can infer from case law as well as experience, however, that it is a file that contains "vast amounts of personal data" on a named individual, and that is intended to provide confidentiality of personal matters.

A personnel file, retrievable by an individual's name, contains a collection of data and documents, both formal and informal, reflecting management action and deliberation on all employment and related matters concerning the individual. It is far more than a formal record of final actions. It is a compendium of that employee's total employment history. A personnel file contains information both of a factual, final action nature, and information of a type likely to be considered "an intimate personal nature."

A typical record contains information on educational experience, prior work experience, state or union certification documents, college grade transcripts and/or high school diplomas or equivalents; payroll information;

information as to date and place of birth; insurance and pension beneficiary designates; names, addresses, and birthdates of dependents, whether living with the employee or not; insurance coverage; employment attendance history, and health information; "rap sheets" of prior arrests and convictions, where such information is required by the state as a condition of employment or certification; performance evaluations; letters of commendation and reprimand; grievances filed; all correspondence by the employee to the personnel department, and often copies of correspondence to other managers on a myriad of subjects; and materials leading to resignation or to disciplinary actions of suspension or termination.

The Supreme Court noted in *Dept. of Air Force v. Rose* that "[t]here is sparse legislative history as to the precise scope intended for the term. . . ."[5] The Court suggests that Congress intended that the term not be critical in the application of Exemption 6, but that the term was to provide for the confidentiality of personal matters.

The *Rose* case was an action to compel disclosure to student editors and former student editors of the New York University Law Review, under the federal FOI statute, when the Department of the Air Force denied access to cadet case summaries of Air Force Academy hearings. The Court described personnel files as containing:

> the 'vast amounts of personal data' which constitute [a] profile of an individual , . . showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance. Moreover, access . . . [to personnel files is] . . . drastically limited, . . . to supervisory personnel directly involved with the individual [and to] the personnel department. . . .[6]

This definition was followed in the only state case on point, the Georgia case involving university records. The Georgia court determined that the consultant committee's report which included "candid evaluations of personnel," did not meet the *Rose* test of "vast amounts of personal data."

Information in a personnel file applies to a particular individual. The disclosure exemption was intended to cover detailed government records on an individual which can be identified as applying to that individual. However, exemptions should not depend on how the file is labeled. "Courts must look past mere appearances and beneath labels, to the actual character and nature of the information in question."[7]

Particularly in state statutes with language that varies from the federal statute, it is important to consider the specific information at contest. It is not how the information is labeled—intimate or nonpersonal, personnel file or similar file—but the information content which will determine disclosure or exemption.

Is There a Personal Privacy Interest?

Once it is established that the disputed material is that of a public agency, is a public record under the appropriate statute, and is a personnel file, the administrator seeking to resist disclosure must be able to identify a personal privacy interest. The personal interest must be substantial. It must be more than a mere possibility. The interest must be such that disclosure would harm the individual—for example, harm by embarrassment, loss of reputation, or loss of employment.

One of the earliest cases construing this issue is one involving an action by law professors engaged in an NLRB voting study to secure release of names and addresses of employees eligible to vote in certain representation elections. Here, the personal interest was found insufficient to prevent release, as the information was not "intimate details of a highly personal nature."

Again, the *Rose* Court is instructive:

> The legislative history is clear that [the statute] was directed at threats to privacy interests more palpable than mere possibilities. . . . The exemption was intended to exclude files 'the disclosure of which might harm the individual' . . . [and] detailed Government records on an individual which *can* be identified as applying to that individual. . . .[8]

Thus, in this Air Force Academy case, the Court held that disclosure of information regarding ethical behavior of cadets that was in anonymous summary form, with personal identification material deleted, would not expose cadets to "lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends."[9]

This concept is also found in two nonschool cases. In one, the ancient concept that "a man's home is his castle" was balanced against purely commercial, not public, purpose; the court held names or addresses of persons registered to produce family wine without tax payment were not disclosable to an amateur wine-making equipment distributor. In the other, materials containing information regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation, etc., were held to be "intimate details."

Although the threat of embarrassment was a signifi-

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School Personnel Records Guidelines

These guidelines, based on case law, have been drafted to assist school officials in the wise exercise of discretion when called upon to decide whether requested personnel records information should be retained as confidential or should be disclosed.*

1. Be familiar with federal and state statutes that apply to your district. Keep a file available for review which contains copies of (a) the Federal Freedom of Information Act (FOIA), 5 U.S.C. sec. 552 (1966, rev. 1976); (b) the Federal Privacy Act, U.S.C. sec. 552a (1976); and (c) current copies of your state FOIA and Privacy Act.

2. When confronted with a third party request for information contained in personnel files, do not rely on an exemption in the privacy act before thoroughly analyzing the competing interests under the appropriate FOIA.

3. Remember that you are a trustee of public records, and that the balance of competing interests between the public's right to know, and an individual's right to privacy tips in favor of disclosure.

4. Identify the specific party making the disclosure request, the specific information requested, and the public purpose for the request. For example, Joe Smith, reporter of the *XYZ Times*, requests information from John Doe's file regarding an alleged investigation into accusations of inappropriate sexual behavior with high school students in order to warn students, inform the public, etc.

5. Identify the specific statutory exemption you believe applies to this request. For example, a state statute exempting "personnel files."

6. Remember that the identified disclosure exemption will be narrowly construed by the court, and that the burden will be on the school district (and you as its agent) as the party opposing disclosure to demonstrate that the information sought is statutorily exempt.

7. Call your school district attorney if uncertain; but you may save many phone calls if you first analyze the issue in light of the questions that follow.

8. Does this request involve a public agency? If clearly a public school, yes. (If clearly a private school, refer to the common law.) If the information was created by a private party representing the district on a contractual basis, the answer will probably still be yes.

9. Is the requested information a public record? Look carefully at the wording of your state statute. Is "public record" defined as information which is "required to be kept," or "necessary to be kept"? If the information could be categorized as "preliminary material," not final information of action taken or knowledge acquired, the answer may be "no" under this more narrow definition. If your statutory definition is so broad as to include "any record kept," the answer may well be yes.

10. Is this information in a personnel file, or similar file? That is, does the record contain identifiable personal information generally considered confidential? Is access to the record restricted? Is the information sought generally considered to be "intimate details" of a highly personal nature? If, for example, the information sought is for the number of employees tested for drugs, or communicable disease, the answer would be "no" (although the information may be exempt under a different rule). However, if the request is for John Jones' fingerprint results, or for the names of employees with low GRE scores, the answer would probably be "yes."

11. Is there a personal privacy interest? Is the interest substantial and identifiable, rather than merely speculative or conclusory? Have you evidence to support this claim? Even if you can answer "yes" to this question, remember that this privacy interest must yet be balanced against disclosure interests.

12. Would disclosure of this personal interest be a "clearly unwarranted invasion of personal privacy?" Would the ordinary person agree?

That is, was there a clear and legitimate expectation of privacy on the part of the individual? Does this interest override that of the public purpose in knowing? That is, would disclosure of the information create lifelong embarrassment, disgrace, loss of friends? Would disclosure have an adverse effect on the individual's standing in the community, or current employment position, or future employment? Is the interest one of ethical propriety or individual honor? If the answer to this question is "yes," and is "no" to #13, the information may be exempt from disclosure.

13. Is the requested information available from another public source?

14. Remember that there is case law in some states to suggest the following exemptions from disclosure:

a. Names of job applicants where there is a showing that disclosure would adversely affect community standing, or present or future employment

b. Information regarding individual ethical behavior

c. Consultant's preliminary handwritten notes made during or shortly after interviews with job applicants

d. Personal data such as birthplace, parent names, school records, prior places of residence, marital status, child's identity, and work performance evaluations

e. "Rap sheets"

f. Names and addresses where the purpose is purely commercial.

15. Remember, there is more case law to show the following kinds of information are NOT exempt from disclosure:

a. Grievances and grievance decisions to a competing union when all references to personal information are excised

b. A report prepared by an outside contractor which evaluates a program, even though the report includes candid evaluations of personnel

c. Consultant letters, memoranda, resumés, and travel vouchers

d. Names and addresses of employees

e. Names and addresses of retirees

f. Employee names and salaries

g. Names of substitute teachers

h. Employee attendance records, with sensitive personal information omitted.

16. If you believe the requested information is exempt from disclosure rules, turn to the privacy act for your state. Is there a statutory duty not to disclose the information under this act?

17. At this step, if your analysis leads you to believe the requested information should be exempt from disclosure, or that you have an affirmative duty not to disclose the information, and you have reason to believe that your refusal will be contested, call your school counsel *before* you act.

18. Remember that disputed information can be reviewed by the court *in camera* for a ruling on disclosure. Your counsel will help you weigh the risks of court appeal against those for failure to disclose.

19. Revise your employment application forms to include this question: "Do you object to the release of information related to this application, or the fact of your application, to anyone other than submitted references?" Yes____ No ____ Reason _____

_____

20. Review your personnel record keeping and access practices. Separate basic employment history (final actions and employment facts such as attendance and leaves) from material containing the "vast amounts of personal data" and "intimate details" more likely to be exempt under your state law.

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cant factor in *Rose*, a District of Columbia court points out in another case that there is no implication that "embarrassment" alone would justify nondisclosure. Contrasting the *Rose* case where "judgments of ethical propriety and individual honor" were involved, the CIA was directed to disclose the names of persons and institutions who conducted scientific and behavioral research under contracts with or funded by the CIA.[10]

The privacy interest also must be identified as applying to that particular individual and, for example, "not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records." School personnel must keep in mind that only individuals, not institutions, are protected by Exemption 6 or similar state statutes.

Types of information that courts have considered to have a personal privacy interest, and which typically are found in school personnel files, are: "rap sheets" (individual's arrest and conviction record); names of employees affected by hiring freeze or reduction in force (RIF); addresses of requester's children; names of persons with high [or low] performance ratings; college grades; and investigations regarding past or future employment.

At this juncture, it is useful to clarify the basic concept in the analysis of these two competing types of legislation. A finding that a privacy interest exists does not mean that the information is automatically exempt. Rather, it means that the "information is sufficiently private so that it must be balanced against disclosure interests to determine if the invasion of privacy is clearly unwarranted."[11]

Clearly Unwarranted Invasion of Personal Privacy

Once it is determined that the information requested is from a public agency, and is a public record, that there is an applicable exemption under the state's public records (FOI) act, and that an issue of personal privacy exists, the focal question regarding invasion of that personal interest is addressed, utilizing a balancing test discussed above.

The *clearly* unwarranted standard is the "expression of a carefully considered congressional policy favoring disclosure." The legislative records reveal that Congress refused to delete the word "clearly," which it considered central in limiting the scope of the exemption.[12] This federal standard has left its imprint on the states as well, which it considered central in limiting the scope of the *personnel file* exemption.

The standard for determining what constitutes a clearly unwarranted invasion of personal privacy is that of "the reasonable man of ordinary sensibilities." The focus must remain on concern for the individual, not on other objectives.

In 1890, Samuel Warren and Louis Brandeis succinctly articulated the invasion of privacy concept:

> It is the unwarranted invasion of individual privacy which is reprehended. . . . The general object in view is to protect the privacy of private life . . . [N]o fixed formula can be used . . . Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case. . . .[13]

In application, four factors should be balanced in weighing a federal claim of exemption for clearly unwarranted invasion of personal privacy: plaintiff's interest in disclosure, public interest in disclosure, degree of invasion of personal privacy, and availability of any alternative means of obtaining the requested information. A fifth factor is suggested in some cases: the subject's legitimate expectation of confidentiality.

Few cases reported at the state level have reviewed questions of disclosure concerning personnel files. Three cases involve universities. In the Georgia case considering an outside contractor's final report evaluating university departments, the court found "no benefits accruing to the government from nondisclosure which would justify contravening the public policy of this state in favor of open government." The court continued, "[T]he reason urged by the state . . . that such reports must be protected in order to assure candid assessments by evaluators does not overcome the need for the public to obtain the reported information." However, in reaching this conclusion, the court distinguished the disputed information from "the vast amounts of personal data" found in a personnel file.[14]

In a Michigan case, the court ordered disclosure of employee names and salaries to a private party, saying that the minor invasion of privacy occasioned by disclosure of the information was outweighed by the public's right to know precisely how its tax dollars were spent. The state's "conclusory allegations" that release of this information would create ill will, hard feelings, and prejudice among the employees did not carry its burden of justification.[15]

A Texas court held proper the release of names and qualifications of candidates for university president where the facts were not of a highly embarrassing or intimate nature, and where publication would not be highly objectionable to a reasonable person.[16]

Four public schools cases considered this balancing of interests regarding requests for employee or prospective

employee information. Only one case found a supportable invasion of privacy effect under limited circumstances.

In *Attorney General v. School Committee of Northhampton*, a news reporter requested names of applicants for the vacant position of superintendent. The court held that on an applicant by applicant basis, an adequate showing could be made for nondisclosure of certain applicant names. Where a possible adverse effect on the applicant's attempts to find future employment, on his current position, or on his standing in the community, would occur by the disclosure of an applicant's name, such disclosure would be an invasion of privacy. In effect, the court held, however, that not all names could be withheld just because some could be withheld.[17]

On the other hand, no invasion of personal privacy was found when a union requested names and addresses of retired school teachers. New York failed to persuade the court that an invasion of privacy could exist because the requested information would be used for commercial or fund raising purposes. The court held there was no invasion of privacy because dues solicitation was not fund raising; the dollars collected from solicited retired teachers would be used to provide those individuals with pension information, for lobbying on their behalf, and for lawsuits if necessary to protect their interests.[18]

In an Oregon case, a list of names of substitute teachers was ordered released in the face of those teachers' objection. Because any parent could find out the name of their child's substitute, the court held that a teacher could not contend that such information was so personal as to be exempt.[19]

Similarly, a Pennsylvania court held teacher attendance records should be released, holding that the fact of illness or family death would not impair reputation or personal security. The court noted that a school district should keep such record cards separate from other records containing sensitive information which could be found exempt from disclosure.[20]

These cases give direction to this *Memorandum's* initial sex harassment hypothetical, as does another relevant Georgia federal case. The mere fact that records of investigation into alleged misconduct of employees had been placed in the personnel file of each investigated employee did not transform the records into "personnel-related" files which might otherwise be exempt from public disclosure.

They did not contain vast amounts of personal data constituting the employee profile typically found in personnel records. The investigation records were properly subject to disclosure where the investigation had already been completed and the public had an overriding interest in learning the results of the investigation. Thus, the fact of an ongoing investigation regarding alleged sexual harassment, and the result of a concluded investigation, would probably be disclosable.

The intimate details of an ongoing investigation, coupled with prelitigation potential, probably would not be disclosable. If the named individual could make a showing of unwarranted invasion because disclosure would have lifelong impediment, given the nature of the allegations, there could be a basis for redacting the name of the individual being investigated. The same would not be true regarding the investigation results.

Conclusion

The trustee concept strongly impels the administrator to tip the balance toward disclosure when confronted with a request by a third party for information contained within school personnel records. Yet the official must exercise discretion in order to avoid a clearly unwarranted invasion of personal privacy.

These two competing interests—the public's right to know and the individual's right to privacy—are delicately balanced so that disclosure would serve a specific public purpose that overrides a named individual's rights and/or expectations of privacy. Only when the party opposing disclosure can show that the information in the personnel file is personal data of intimate detail so that disclosure would be a "clearly unwarranted" invasion of personal privacy, will the balance tip in favor of the individual.

And even though administrators may learn to exercise discretion wisely, in the final analysis, the courts have reserved to themselves the ultimate decision as to whether or not a particular document or portion of a document is to be disclosed.

Footnotes

1. For purposes of this *Memorandum*, issues of access will imply requests by third parties; not at issue here are questions of access by the individual to his or her own records. Additionally, this publication does not consider student personnel files covered by the federal "Buckley Amendment," Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. sec.1232g (1982) [FERPA], and parallel state statutes. See NASSP *Legal Memo* "The Student's Privacy: A Developing Concept. Part One: Student

Records" (January, 1983).

2. O.R.C. sec. 149.43(a)(1).

3. Shevin v. Byron, Harless, Schaffer, etc., 379 So.2d 633, 640 (1980).

4. 5 U.S.C. Sec. 552 (1966, rev. 1976). Medical records are exempted nearly universally, and are not a subject of this *Memorandum*. "Similar files" language gave rise to considerable controversy until the Supreme Court determined that the term should be interpreted broadly. *See* Department of State v. Washington Post Co., 456 U.S. 595, 600 (1982). This *Memorandum* does not analyze this term; however, precedents helpful to issues of personnel files may be found in cases that considered "similar" files.

5. 425 U.S. at 375 n.14, 48 L.Ed. 29.

6. *Id.* at 377.

7. Florida Medical Assn. v. Dept. of Health, Education, etc., 479 F.Supp. at 1303. *See also* Dept. of Air Force v. Rose, 425 U.S. at 372.

8. 425 U.S. at 380 n.19, 48 L.Ed.2d at 32.

9. *Id.* at 377.

10. Sims v. Central Intelligence Agency, 642 F.2d at 575. No institution was identified in the case reported; however, the research under contention—chemical, biological, and radiological materials capable of employment in clandestine operations—is typically performed by individuals connected with university institutions.

11. Washington Post Co. v. HHS, 690 F.2d at 261.

12. MacHacek v. Harris, 106 Misc.2d 388, ___, 431 NYS2d 927, ___, (1980).

13. 4 Harv. L. Rev. at 215.

14. Athens v. Anderson, 245 Ga. 63, 263 S.E.2d at 128, 26 ALR4th at 660, 665 (1980).

15. Penokie v. Michigan Technological University, 93 Mich. App. 650, 287 N.W.2d 304, 309-310 (1979).

16. Hubert v. Harte-Hanks Texas Newspapers, Inc. 652 S.W.2d 546, ___ (Tex.App. Austin 1983).

17. 375 Mass. 127, 375 N.E.2d 1188 (1978).

18. New York Teachers Pension Assoc. v. Teachers' Retirement System, 71 App.Div.2d 250, 422 NYS2d 389 (1979).

19. Morrison v. School Dist., 53 Or.App.148, ___, 631 P.2d 784, ___ (1981).

20. Kanzelmeyer v. Eger, 16 Pa. Cmwlth 495, ___, 329 A.2d 307, ___ (1974).

This *Legal Memorandum* is a revision of an article by Louise Burrill Ebeling, an Ohio attorney and assistant professor at Ohio University School of Education. The article was first published in "Education Law Update 1987-88" (1988). Topeka, KA: NOLPE (National Organization on Legal Problems of Education).

A Legal Memorandum is a publication of the National Association of Secondary School Principals, 1904 Association Dr., Reston, Va. 22091. Telephone (703) 860-0200. Annual subscription rate of $4 is included in the NASSP dues. Additional copies may be ordered: single copies, $1 each; 2-10 copies, 85 cents each; 11-99 copies, 75 cents each; 100 or more copies, 60 cents each. Individual subscriptions are not available.

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